Cempaka Finance Bhd v Fajar Lodge Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-22-650 OF 1998
ABDUL AZIZ J
1 DECEMBER 1999

Civil Procedure *— Adjournment — Refusal — Summary judgment entered in absence of defendant's counsel — Whether appealable — Whether should proceed under O 14 r 11 Rules of the High Court 1980 to set aside judgment*

Civil Procedure *— Appeal — Court refused to grant adjournment — Summary judgment entered in absence of defendant's counsel, whether appealable — Whether should proceed under O 14 r 11 Rules of the High Court 1980 to set aside judgment*

Civil Procedure *— Appeal — Notice of — Notice states why appeal ought to be granted — Whether proper*

The plaintiffs were granted summary judgment against the defendants when the senior assistant registrar ('SAR') refused to grant the defendants' counsel an adjournment and proceeded to hear the plaintiffs' counsel in the absence of the defendants' counsel. The defendants appealed to the judge in chambers. Counsel for the plaintiffs objected to the notice of appeal and raised the issue of whether there can be an appeal on the question of adjournment. Further, counsel contended that the defendants should have proceeded by appealing under O 14 r 11 of the Rules of the High Court 1980 ('the RHC') to set aside the summary judgment.

Held, dismissing the preliminary objections:

(1) The fact that the statement of the order appealed against also states the causal link between the refusal of the adjournment and the summary judgment was not fatal to the notice of appeal (see p 154C). Also, the fact that, in stating the orders sought, the reasons why they ought to have been granted were also given, was again not fatal to the notice. The issue whether the orders sought were proper in view of the manner in which the orders appealed against were stated is a matter to be decided on the disposal of the appeal (see p 154E).

(2) As to whether there can be an appeal on the question of adjournment, the question lost its importance on the appeal being viewed as an appeal against summary judgment, with the refusal of adjournment as the sole ground for the appeal. The passage cited by the plaintiffs' counsel from *Insas Bhd v Ayer Molek Rubber Co Ltd* was about appeals against the granting of adjournments whereas the grievance of the defendants in this case was over the refusal of an adjournment, which resulted in a judgment against them (see p 154G–H); *Insas Bhd v Ayer Molek Rubber Co Ltd* [1995] 2 MLJ 833 distinguished.

(3) The defendants should not be told that they ought to have proceeded under O 14 r 11 unless it could be shown that, by their taking the appeal route, the plaintiffs had been prejudiced. The defendants were not confined to seeking their remedy only by an application to set aside the judgment as the rule did not preclude the defendants from appealing under O 56. There was no prejudice to the plaintiffs as the hearing of an application by the SAR and on appeal from his decision were in effect one stage because both are hearings in the High Court and the hearing of an appeal before the judge was in practice a rehearing (see p 155A–C).

(4) As to whether the defendants' counsel has valid excuse for not attending court on 18 July 1998 and sought for an adjournment, for the purpose of the appeal, the defendants' counsel is required to file an affidavit deposing his personal circumstances on 17 and 18 July 1998 that were relevant to his failure to attend court on 18 July and the plaintiffs has the right to file an affidavit in reply (see p 155E–H).

[Bahasa Malaysia summary

Plaintif telah diberikan penghakiman terus terhadap defendan-defendan apabila penolong kanan pendaftar ('PKP') enggan memberikan peguam defendan suatu penangguhan dan terus mendengar peguam plaintif walaupun peguam defendan tidak hadir. Defendan-defendan telah merayu kepada hakim dalam kamar. Peguam untuk plaintif-plaintif telah membantah kepada notis rayuan tersebut dan telah membangkitkan isu sama ada boleh terdapat rayuan di atas persoalan penangguhan. Selanjutnya, peguam telah menegaskan bahawa defendan-defendan sepatutnya bermula dengan merayu di bawah A 14 k 11 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk mengetepikan penghakiman terus tersebut.

Diputuskan, menolak bantahan-bantahan awal tersebut:

(1) Fakta bahawa pernyataan di dalam perintah yang dirayukan menyatakan pertalian sebab akibat antara keengganan untuk menangguh dan penghakiman terus adalah tidak memudaratkan notis rayuan (lihat ms 154C). Juga, fakta bahawa, dalam menyatakan perintah-perintah yang dipohon, sebab mengapa ia patut dibenarkan juga diberikan, sekali lagi bukanlah memudaratkan notis tersebut. Isu sama ada perintah-perintah yang dipohon adalah wajar memandangkan cara di mana perintah tersebut yang dirayu terhadap adalah dinyatakan akan diputuskan dengan penyelesaian rayuan tersebut (lihat ms 154E).

(2) Berkenaan dengan sama ada boleh terdapat rayaun di atas persoalan penangguhan, persoalan ini tidak penting lagi apabila rayuan dilihat sebagai rayuan terhadap penghakiman terus,

dengan keengganan penangguhan sebagai alasan tunggal untuk rayuan. Perenggan yang dinyatakan oleh peguam plaintif daripada *Insas Bhd v Ayer Molek Rubber Co Ltd* adalah berkenaan dengan rayuan-rayuan terhadap pemberian penangguhan sementara aduan defendan-defendan adalah berkenaan dengan keengganan untuk suatu penangguhan, yang mengakibatkan suatu penghakiman terhadap mereka (lihat ms 154G–H); *Insas Bhd v Ayer Molek Rubber Co Ltd* [1995] 2 MLJ 833 dibeza.

(3) Defendan-defendan tidak patut diberitahu bahawa mereka patut bertindak di bawah A 14 k 11 kecuali ia boleh dibuktikan bahawa, dengan mengambil jalan rayuan, plaintif-plaintif diprejudiskan. Defendan-defendan tidak dihadkan untuk mendapatkan remedi hanya dengan permohonan untuk mengetepikan penghakiman tersebut kerana peraturan tersebut tidak mengecualikan defendan-defendan daripada merayu di bawah A 56. Tiada prejudis kepada plaintif-plaintif oleh kerana pendengaran suatu permohonan oleh PKP dan rayuan daripada keputusannya adalah sebenarnya satu peringkat yang sama kerana kedua-duanya adalah pendengaran di Mahkamah Tinggi dan pendengaran suatu rayuan di hadapan seorang hakim adalah secara amalan suatu pendengaran semula (lihat ms 155A–C).

(4) Berkenaan sama ada peguam defendan mempunyai alasan yang sah untuk tidak hadir di mahkamah pada 18 Julai 1998 dan meminta untuk penangguhan, bagi tujuan rayuan tersebut, peguam defendan adalah diperlukan untuk memfailkan afidavit mendeposkan keadaan-keadaan peribadinya pada 17 dan 18 Julai 1998 yang adalah relevan kepada kegagalannya untuk menghadiri mahkamah pada 18 Julai dan plaintif-plaintif mempunyai hak untuk memfailkan suatu afidavit balasan (lihat ms 155E–H).]

Notes

For cases on adjournments generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 130–139.

For cases on notice of appeal, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 787–842.

Cases referred to

Bank Bumiputra (M) Bhd v Aik Lee Feedmill Co Sdn Bhd & Ors [1999] 1 MLJ 529 (refd)

Insas Bhd v Ayer Molek Rubber Co Ltd [1995] 2 MLJ 833 (distd)

Legislation referred to

Rules of the High Court 1980 O14 r 11, O 56

Wong Ming (*Zairina Loh & Wong*) for the plaintiffs.

R Kengadharan (*Kengadharan & Co*) for the defendants.

Cur Adv Vult A

Abdul Aziz J: As regards compliance of the notice of appeal with Form 114, I find that the notice of appeal does state the orders appealed against. They are the order of the senior assistant registrar ('the SAR') refusing the application for an adjournment and the order of the SAR giving summary judgment after hearing the plaintiffs' counsel in the absence of the B defendants' counsel. From the manner the orders appealed against are stated in the notice of appeal, I understand that the defendants are aggrieved by the refusal of the adjournment and by the summary judgment which ensued from the SAR's proceeding to hear the plaintiffs' application in the absence of the defendants' counsel. The appeal is, in effect and ultimately, an appeal against the summary judgment but based on the C ground that the SAR ought to have allowed the adjournment. The fact that the statement of the order appealed against No (ii) also states the causal link between the refusal of the adjournment and the summary judgment is not fatal to the notice of appeal and is in fact useful as an indication of the ground of the appeal against the summary judgment, the ground being that D the refusal of the adjournment was wrong. If and when the appeal comes to be heard, the only question will then be whether the adjournment ought to have been granted. If it ought to have been granted, the appeal should be allowed, the summary judgment set aside and the SAR ordered to hear the application afresh.

I find that the notice of appeal also does state the orders sought to be E obtained. The fact that, in stating the orders sought, the reasons why they ought to have been granted are also given is again not fatal to the notice. As to whether the orders sought are proper in view of the manner in which the orders appealed against are stated, that is a matter to be decided on the disposal of the appeal. The court may always, on an appeal, make orders F suitable to the circumstances although they differ from the orders that are stated to be sought to be obtained. I have already indicated that as the defendants' grievance is over the refusal of the adjournment, and as the adjournment was sought on medical grounds, the order sought No (ii), and also a part of the order sought No (iii), may not be appropriate.

As to whether there can be an appeal on the question of adjournment, G the question loses its importance on the appeal being viewed as an appeal against summary judgment, with the refusal of adjournment as the sole ground for the appeal. Moreover, the passage cited by the plaintiffs' counsel from *Insas Bhd v Ayer Molek Rubber Co Ltd* [1995] 2 MLJ 833 is about appeals against the granting of adjournments whereas here the grievance of H the defendants is over the refusal of an adjournment, which refusal has resulted in a judgment against them.

As to O 14 r 11 of the Rules of the High Court 1980 ('the RHC'), although this case does fall within the scope of that rule because it is a case of a 'judgment given against a party who does not appear at the hearing of an application under r 1', I do not think that the defendants are confined to I seeking their remedy only by an application to set aside the judgment. The rule says that the 'judgment... may be set aside'. It does not preclude the

A defendants from appealing under O 56. The defendants should not be told that they ought to have proceeded under O 14 r 11 unless it can be shown that by their taking the appeal route the plaintiffs would be prejudiced. The only prejudice suggested by reference to *Bank Bumiputra (M) Bhd v Aik Lee Feedmill Co Sdn Bhd & Ors* [1999] 1 MLJ 529 is that by the defendants
B going on an appeal to the judge instead of applying to the SAR for setting aside, the plaintiffs will lose one stage of hearing or appeal. But I do not think that the loss is a material loss because hearings on an application to an SAR and on an appeal from his decision are in effect one stage because both are hearings in the High Court and the hearing of an appeal before the judge is in practice a rehearing.

C For those reasons, I dismiss the preliminary objections.

As I said, the issue in the appeal is whether the SAR was right in refusing the adjournment. On 18 July 1998, according to the SAR's notes, the plaintiffs' counsel expressed doubt about the genuineness of the medical
D certificate from the defendants' counsel because it was dated 17 July 1998 but the defendants' counsel's unfitness for duty was certified for 18 July. In refusing the adjournment, the SAR did not expressly say that the medical certificate was not genuine. He said he refused the adjournment after scrutinizing the certificate and after getting a telephone call from the defendants' counsel who said he was telephoning from the office. It is
E possible that the SAR was influenced by the facts that the certificate was dated 17 July and that on 18 July the defendants' counsel was able to telephone from the office. It comes down to the question whether the SAR was right in deciding, as he must have done, that the defendants' counsel had no valid excuse for not attending court on 18 July and for seeking an
F adjournment.

The SAR had to make his decision about adjournment on the 18th itself. He had no time to investigate or to call for affidavits to verify the true condition of the defendants' counsel on that date.

For the purpose of the appeal, it will not be sufficient to consider the
G question solely on the circumstances apparent to the SAR on the 18th. The defendants' counsel may want to state on oath his actual circumstances on 17 and 18 July, something which he could not have done for the purposes of the SAR. If there is truth to be told, let it be told in this appeal. For that reason, I will allow the defendants' counsel to file within 14 days an affidavit
H deposing to his personal circumstances on 17 and 18 July that are relevant to his failure to attend court on 18 July. The plaintiffs will of course have the right to file an affidavit in reply.

Preliminary objections dismissed.

I Reported by Chin En Tek